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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

CARL JACKSON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petition for writ of certiorari filed by the Florida Attorney General requests that this Court review and reverse the unanimous decision of the United States Court of Appeals for the Eleventh Circuit which found that the proceedings resulting in Carl Jackson's sentence of death violated the eighth and fourteenth amendments to the United States Constitution. The eighth amendment violation was the same as the one which this Court unanimously found to violate the Constitution in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). As in Hitchcock, the Court of Appeals found that the Florida proceedings resulting in Carl Jackson's death sentence did not allow for the meaningful consideration of mitigating evidence. The Court of Appeals also concluded "that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation"; that "reasonable jurors could base a decision" to vote for life on the evidence; and that the constitutional error therefore could not be deemed harmless beyond a reasonable doubt. Jackson v. Dugger, 931 F.2d 712, 717-18 (11th Cir. 1991). The Florida Attorney General's requests for rehearing and rehearing en banc were then denied by the Court of Appeals with "no member of [the] panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc." Jackson v. Dugger, No. 90-3237, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, April 29, 1991 (Petitioner's Appendix A-45).

This response discusses the propriety of the ruling of the

unanimous Court of Appeals, a ruling that is in full accord with the eighth amendment precedents of this Court and with the precedents of the Eleventh Circuit in cases involving claims of Hitchcock error. Given the Court of Appeals' ruling, its consistency with settled precedent, the parties' positions below, and the current arguments of the Attorney General, we respectfully submit that neither an issue of substance nor an issue open to debate is presented by the Attorney General's petition. Because the petition presents no valid reason warranting a reversal of the decision of the Court of Appeals, we respectfully submit that the request for certiorari review should be denied.

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OPINIONS BELOW

The Respondent agrees with the Petitioner's statement. The Respondent also notes that during the hearing at which the District Court orally pronounced its ruling the Court made certain observations which related to its ruling but which are not reproduced in the Petitioner's transcript excerpt. The text of this response discusses the relevant observations.

JURISDICTION

The Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth Amendment to the United States Constitution. The Respondent additionally respectfully submits that this case involves the Fourteenth Amendment to the United States Constitution. The Respondent submits that this case involves no Tenth Amendment issues.

INTRODUCTION AND STATEMENT OF THE CASE

The Respondent respectfully submits that there are significant deficiencies in the Petitioner's statement of the case. This discussion is intended to provide a proper perspective relating to the ruling of the Court of Appeals, the positions of the parties, and the relevant facts, as well as an overview of what this case involves in light of the applicable precedents.

The opinion of the Eleventh Circuit Court of Appeals is reported as Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991). A copy of the opinion is appended hereto. The State's petition for

rehearing and suggestion for rehearing en banc was denied on April 29, 1991, with no Judge serving on the Court suggesting that the decision should be reheard (Petitioner's Appendix A-45). The Court of Appeals' panel was comprised of Judges Cox, Johnson, and Edmondson. Judge Cox authored the opinion. The Court's opinion listed the previous rulings of the state courts during direct appeal and post-conviction proceedings. See Jackson v. Dugger, 931 F.2d at 714. These opinions were also listed at pp. 1-2 of the State's petition ("Opinions Below") and were included in the Appendix to the Petition. The opinion of the Florida Supreme Court relating to the Hitchcock issue is reported as Jackson v. Dugger, 529 So.2d 1081 (Fla. 1988). The District Court did not issue a written order but made a brief oral statement denying relief.

A. Introduction[1]

Every court which has considered the issue has agreed that the eighth amendment was violated during the proceedings resulting in Carl Jackson's death sentence and each court has agreed that the error involved in this case is the same as the one upon which this Court unanimously granted relief in Hitchcock v. Dugger itself. See e.g., Jackson v. Dugger, 931 F.2d 712, 716 (11th Cir. 1991) ("In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court

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[1] The citation method employed in this response is the same as that employed in Mr. Jackson's initial brief to the Court of Appeals. "R." refers to the record before the Court of Appeals with volume, document, and page number citations following thereafter. "Supp. R." refers to the supplemental record before the Court of Appeals with the page number cited thereafter.

found, that Jackson's sentencing hearing violated Hitchcock."); Jackson v. Dugger, 529 So.2d 1081, 1082 (Fla. 1988) ("[A] sentencing error occurred under the rationale of Hitchcock"); Jackson v. Dugger (Hearing Before the District Court, March 23, 1990) ("I don't think it's disputed there was a Hitchcock violation") (Supp. R-8).[2] In its current petition, the State does not disagree with the Court of Appeals that the proceedings resulting in Carl Jackson's death sentence violated the eighth amendment. See Petition for Writ of Certiorari (hereinafter "Petition"), p.11 ("Carl Jackson was sentenced to death in a (Florida) penalty-phase proceeding conducted in violation of the legal standards recognized in Hitchcock v. Dugger ....")

These conclusions are plainly correct. The proceedings in Mr. Jackson's case are virtually identical to the proceedings which this Court found violative of the eighth and fourteenth amendments in Hitchcock v. Dugger. The jury was not allowed to consider mitigating factors that did not relate to the strict statutory list then in effect. See Jackson, 931 F.2d at 716 ("The trial court's instructions were almost identical to those given in Hitchcock"); see also id. at n.8 (comparing the instructions in this case to those in Hitchcock); cf. Delap v. Dugger, 890 F.2d 285, 303 (11th Cir. 1989) (finding that instructions which were the same as those given in Carl Jackson's

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[2] Although finding that Hitchcock error occurred, the district court denied relief, ruling that the error was harmless. The district court did not rule that the mitigating evidence presented by Mr. Jackson was untrue, insubstantial, unreliable, or that it was not mitigating evidence. The court did not dispute the existence of the mitigating evidence which Mr. Jackson presented and made no additional findings of fact.

case were "virtually identical" to those in Hitchcock); see also id. at 303-04 (listing cases in which such instructions have been found to violate the eighth amendment). The trial judge also restricted his own review and did not consider mitigating factors other than those enumerated in the strict statutory list then in effect in Florida. See Jackson, 931 F.2d at 716. And the prosecutor in this case presented an argument akin to the one of the prosecutor in Hitchcock -- he argued that the jury could only consider the mitigating factors "under Florida law" and that the mitigating evidence presented by Mr. Jackson was "not in [the] mitigations" and therefore was not to be considered.[3] As

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[3] Indeed, the prosecutor's penalty phase argument could not have made it clearer that the jury was not to consider the mitigating evidence presented by Mr. Jackson. The prosecutor characterized Mr. Jackson's military service as "excuses, they're not in mitigations" (R. 786), and then informed the jurors:

> I think [the judge is] going to instruct you on aggravation and mitigating circumstances. One out of about seven or eight mitigating circumstances said it would be mitigation if the defendant has no significant prior criminal activity. Then I want you to listen closely and see if there's any other mitigations that have been proved here, that is mentioned under Florida law.

(R. 787)(emphasis added). As in Hitchcock, the prosecutor informed the jury "to consider the mitigating circumstances and consider those by number" and argued that only one -- a statutory factor -- was applicable. Hitchcock, 107 S. Ct. at 1824.

The prosecutor also repeatedly urged the jurors to "listen to the mitigations, see if there's significant mitigation under the law. If there's not [and].... [i]f the aggravation is there, under the law of Florida, then I'm saying the law gives the death penalty" (R. 791). According to the prosecutor's argument, the only mitigation that counted was "significant mitigation under the law," i.e., statutory mitigation, and not "excuses", i.e., nonstatutory mitigation. The Court of Appeals found that the nonstatutory mitigation in this case was "significant." In the context of this sentencing proceeding, this significant

(continued...)

the Court of Appeals found, in Mr. Jackson's case, as in Hitchcock itself, the proceedings did not comport with the eighth and fourteenth amendments.

Substantial, "significant," Jackson, 931 F.2d at 717, evidence in mitigation had been presented on Mr. Jackson's behalf: Mr. Jackson had served eight years in the military, spent three tours of duty in combat in VietNam, was wounded during that service, and was discharged under honorable conditions; after his military discharge, Mr. Jackson received benefits from the Veterans Administration and attended college, attempting to better his life; he had strong religious convictions, convictions which aided those around him; he was amenable to incarceration; he had no prior history of violence and was well thought of by his family, friends, and minister.[4]

In the context of capital sentencing cases, this Court's precedents have consistently held that restrictions on the jury's consideration of evidence in mitigation, particularly where, as here, the evidence is evidence of substance, cannot be squared with the eighth amendment's requirements that capital sentencing proceedings be reliable and individualized. See Lockett v. Ohio, 438 U.S. 586 (1978); Penry v. Lynaugh, 109 S.Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). The eighth

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[3](...continued)
mitigating evidence was afforded no consideration, as the evidence did not fall within the strict statutory list.

[4] This list is not all inclusive but intended to summarize what the record reflects.

amendment protects capital defendants against "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. And contrary to the Attorney General's current assertions, this Court has established a standard of eighth amendment harmless error review. That standard is the one which the Court of Appeals expressly applied in this case.

This Court has indicated that a restriction on the sentencers' consideration of credible evidence in mitigation in a capital case warrants relief if the reviewing court could not "confidently conclude" that the evidence "would have had no effect upon the jury's deliberations." Skipper v. South Carolina, 476 U.S. at 8.[5] This Court applied that standard in Skipper and granted relief. And in Satterwhite v. Texas, 108 S.Ct. 1792 (1988), this Court expressly noted that the standard of harmless error review applicable to constitutional errors in capital sentencing proceedings is the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967). Satterwhite, 108 S.Ct. at 1798. In Satterwhite, this Court first explained that,

> [i]t is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer....,

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[5] Cf. United States v. Bagley, 473 U.S. 667, 679-80 and n.9 (1985) (The standard that reversal is required where there is a "reasonable possibility that the [error] may have contributed to the result" is not in any significant way different than the standard requiring "the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error ... did not contribute [to the result].")

and then held that constitutional error in capital sentencing proceedings requires a strict application of the standard requiring the State to establish that the error is harmless beyond a reasonable doubt. Satterwhite, 108 S.Ct. at 1798. "[A] reviewing court," this Court noted, "can make an intelligent judgment" about whether an error in capital sentencing "might have affected a capital sentencing jury." Id. at 1798.

This is precisely the standard of review which the Court of Appeals applied in this case. See Jackson, 931 F.2d at 716-18. And contrary to the State's suggestions, the question of whether a federal constitutional error is harmless is not a question of "fact," but one of federal law, as this Court indicated in Skipper and Satterwhite, and as the Court of Appeals noted in Mr. Jackson's case:

> The State of Florida argues that this court is bound by the [Florida] supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982), cert. denied, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). See also Booker v. Dugger, 922 F.2d 633, 636 n.4 (11th Cir. 1991).

Jackson v. Dugger, 931 F.2d at 717. See also Townsend v. Sain, 372 U.S. 293, 318 (1963)(the district court "may not defer to [state court] findings of law.... The state conclusions of law may not be given binding weight on habeas"). Accord Miller v. Fenton, 474 U.S. 104, 111-12 (1985).

This Court, the Eleventh Circuit Court of Appeals, and the Florida Supreme Court are all in agreement that a constitutionally valid resentencing proceeding is required if Hitchcock error occurs before a Florida sentencing jury or judge:

> It is well established that a sentencing body must not be limited in its consideration of mitigating circumstances. Hitchcock v. Dugger, --- U.S. ---, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir.1985)(en banc). This principle applies both to the Florida sentencing jury and the sentencing judge. Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); see also Magill v. Dugger, 824 F.2d 879 (11th Cir.1987).

Messer v. Florida, 834 F.2d 890, 892 (11th Cir. 1987).

> [T]he standards imposed by Lockett bind both the judge and the jury under our law . . . If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987)(emphasis supplied).

> [W]hether or not the trial court believed it could consider non-statutory mitigating circumstances, [the death] sentence must be vacated because the jury was so limited.

Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987)(emphasis in original).

> Because the trial judge considered Jones' nonstatutory mitigating evidence in reaching his sentencing decision, the State next argues that this "curative action" rendered the erroneous instruction harmless. We do not agree. This case is nearly identical to Magill v. Dugger, 824 F.2d 879, 894 (11th Cir.1987), also involving Florida's capital sentencing scheme, in which we held that a trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error. Because of the importance of

> the advisory jury in the Florida capital sentencing scheme, we held that Lockett "error can be cured only by a sentencing proceeding before a new advisory jury." Id. at 894.
>
> We applied this same reasoning to jury recommendations which were tainted by Caldwell error in our decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir.1988)(en banc). We observed in Mann that "the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." Id. at 1454. Here, as in Magill and Mann, we conclude that, because the jury recommendation resulted from an unconstitutional procedure, the entire sentencing process has necessarily been tainted. The trial judge's consideration of nonstatutory mitigating evidence, therefore, did not render harmless the Lockett error.

Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989)(footnotes omitted).[6] In Mr. Jackson's case, neither the jury nor the judge considered significant evidence in mitigation, and under settled eighth amendment principles, the error could not be deemed harmless beyond a reasonable doubt.

B. The Mitigation

There was ample mitigation in this case that the jury and judge should have been allowed to consider but did not consider because of the application of the restrictive sentencing law then in effect in Florida.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the

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[6] See also Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988)("[W]hat is important is what the jury was permitted to consider in making its recommendation to the court."); Ruffin v. Dugger, 848 F.2d 1512, 1518 n.8 (11th Cir. 1988)("Although the jury is not the sentencer in Florida's capital sentencing scheme, it is treated as such for eighth and fourteenth amendment purposes."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event.")

> characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). The same is true in Mr. Jackson's case: Here the jury was not allowed to consider anything which mitigated against death but which was not listed in the statute. The instructions and prosecutorial argument barred the jury's consideration. The judge likewise limited his own consideration.

The defense presented four witnesses at the penalty phase. Through the testimony of these witnesses significant mitigating evidence was presented. Carl Jackson was a man who had served his country in the Army for eight years, including three tours of duty in combat in VietNam, and a man who was wounded during his service to his country; Mr. Jackson wanted to make a career of the military but was badly scarred by his combat experiences; he was discharged from the military under honorable conditions;[7] he attempted to better himself by working and attending college; he was deeply and fervently religious and spent much time in religious contemplation and discussion; his history was one of

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[7] One great irony of this case is that if Mr. Jackson were to be executed, he would be entitled to full military burial rights because of his military service. Thus, his body would be escorted by a military honor guard in a flag-draped coffin; at the funeral service, the flag would be presented to Mr. Jackson's family in appreciation for his service to his country, and a military bugler would play "Taps"; he would have the right to be buried in a national cemetery; the military would provide a marker for his grave which would indicate his dates of service and the campaigns in which he fought. All this would take place although the jury was never allowed to and the judge did not consider the very evidence which entitles Mr. Jackson to these honors: his military combat service and discharge under honorable conditions.

non-violence; and he had accepted being imprisoned and would not be a disciplinary problem. See Skipper v. South Carolina. All of this evidence mitigated. However, the jury was not permitted to consider and the judge failed to consider any of it.

Dr. Cleo C. Warner, a licensed and qualified clinical psychologist, evaluated Mr. Jackson and interviewed him three times for a total of over three hours (R. 740-41). Dr. Warner explained that Mr. Jackson had been in the Army for eight years (R. 741). Mr. Jackson had intended to make the Army a career (R. 741-42), but the Army changed over the years (R. 742), and Mr. Jackson "had a change of heart . . . since he had been through as much combat as he had" (R. 743). Dr. Warner described Mr. Jackson's experiences in VietNam:

> I questioned him about that, because I thought it might tell me something about his mental state. He told me -- he said that he was in Viet Nam three times and on each of those three occasions he was in a combat situation for fairly lengthy period of time. That there was a lot of fighting and a lot of waiting and a lot of impatience and a lot of turmoil that went with being in Viet Nam. He felt like it had an effect on him.

(R. 742). Although his combat experiences took their toll, Mr. Jackson continued to serve his country. He "felt like it was his job. . . . He had been trained as a member of the Army and that was his job" (R. 742). Mr. Jackson had been discharged under honorable conditions (R. 746), and was receiving veteran's benefits as a result (R. 755).

Dr. Warner also discussed Mr. Jackson's religious beliefs with him and found them to be "strong beliefs" (R. 743). In fact, the strength of Mr. Jackson's religious beliefs deeply

impressed Dr. Warner -- a clinical psychologist who had apparently evaluated numerous prisoners and who had never before been impressed with a prisoner's religious beliefs -- to such an extent that Mr. Jackson's discussion of religion helped Dr. Warner in his own life:

Q Didn't you also talk with him about his religious beliefs?

A Quite a bit.

Q What did he tell you about those beliefs, if you recall?

A Uh --

Q Were those strong beliefs?

A Yes, they were strong beliefs, I'll be quite candid with you, all right?

Q All right.

A All right. As I told the man when I was interviewing him, I said, "I'm going to try to put it out of my mind that you are accused of killing two people, because I feel very strongly about that, personally, but I'm going to try to evaluate what you are saying to me." And so we talked a lot and he started talking about his religious beliefs. And the first time that I talked with -- I must admit, for the first time that I talked with any prisoner about their religious beliefs, that I was impressed.

Q In what way?

A I was impressed because I felt like he was able to tell me something about his religious beliefs that I never have heard from anybody before, and it was very clear. And it helped me a little bit in my life, regardless of what happens to Carl Jackson. And I told him so.

Q Do you recall what he told you?

A Yes, I recall very well, because --

Q How about telling us?

A Okay, if you would. What he told me was that

> he had -- he had been doing a lot of thinking about religion, particularly since he got dismissed from the armed services. And that he had gotten confused about it and that he had gotten in trouble by it and that he had tried to grapple with it, do this and do that. He thought about it and thought about it. His phrase was, "I thought about it until it gave me a headache, many times." He said he was trying to make sense out of his life and other people's lives, could be good or could be bad or happy or sad or successful or sinful or not sinful, and how it fit in the over all picture of God and his purpose for people. His main question that he asked himself, I guess, you can correct me if I'm wrong. His main question that he asked himself was what purpose would God have for placing man on the earth. Because man seems to be a very fallible creature, one that sins and one that does this and does that, does something else that seems bad for the earth and bad for the people, and injurious to other people, and so forth and so on. Why would God tolerate such a creature on his earth? He finally came to the conclusion, after a long thinking and long deliberation that God created man so that God would have a vehicle in each of us to come down to the earth and experience life as each of us experiences it. That whatever you are, whatever I am, and whatever each of us is, that each of us gives God a different view of what his universe or his world is like.

(R. 743-45).

Other witnesses who had been close to Mr. Jackson also testified that he was a religious person who read the Bible and tried to figure out its meaning "all the time" (R. 755), and that "he reads the Bible a lot.... He tries to rub off on other people his beliefs. He tries to tell people about God and how they should get closer to him and all" (R. 765-66). A minister who had known Mr. Jackson all of his life (R. 769), and who had been sharing rides with him to the community college (R. 770), testified that they discussed religion and that they discussed Mr. Jackson's preaching at prayer meetings (R. 771). During their discussions, Mr. Jackson "was really concerned about the conditions of the world and what the world needed and some of the

things that was going on in the world, like the lack of love, and how people were treating each other" (R. 772).

Dr. Warner also discussed Mr. Jackson's life after his discharge from the Army. After his discharge, Mr. Jackson "felt like he was kind of without a job or without a professional -- without a profession, fairly suddenly. He had difficulty finding work. . . . He attempted to go work -- he attempted to go to Gulf Coast Junior College to take, I believe, it was an electronic course" (R. 746).

Although while he was in the military Mr. Jackson "had experienced a lot of violence to himself" (R. 747), he was not a violent person. When a man had given him some trouble in the past, Mr. Jackson "attempt[ed] to make peace with him" (R. 747). Vera Nichols, the woman with whom Mr. Jackson lived at the time of the offense, testified that he was never violent toward her or toward her four children who lived with them, who "loved him" (R. 756), and who he supported.

Finally, Dr. Warner discussed Mr. Jackson's ability to adapt to imprisonment:

> He said that he had come to the point so that he could, as far as possible, accept being in jail, in the sense of tolerating it and not trying to make trouble or not trying to stir up anything or not trying to break out or not trying to do any of that sort of thing. He could accept it as far as that. But, he could accept with his religious beliefs, he said that if God, indeed, expected him to be in this place at this time so as to give God that experience, then he would have to go along with it. If that was the way that it had to be.

(R. 748-49).[8]

In addition to the evidence discussed above, the judge had additional information which was not considered. A second mental health expert, John F. Mason, M.D., a psychiatrist, had evaluated Mr. Jackson pretrial but did not testify at the penalty phase. He did, however, provide a report to the judge. That report provided even more information regarding Mr. Jackson's background and character:

> [Mr. Jackson] revealed that he was born in Panama City, Florida, April 4, 1944 of Mary Jackson and Oscar Jackson. His parents are still living; his father is 75 and his mother is 74. He is one of seven siblings of whom two are female and five are male.
>
> When questioned about his schooling he related he had attended school only through the ninth grade but received a GED high school equivalency in 1963, and again had some retesting in 1965.
>
> When questioned about his military service he related he had served from age 17 in 1962 until November 7, 1970 with rank of discharge of E-2. He had served with the Airborne, Mechanized Infantry and as an aviation crewman in Vietnam, Ft. Campbell, Kentucky; Arizona, Georgia, Hawaii, Ethiopia, Turkey and several other bases. He spent a total of 18 months in Vietnam, was wounded ... in the upper right chest ....
>
> * * *
>
> He related that [when he was discharged from the Army] he had first tried to get a civil service job with the Postal Service, then filed for unemployment and later got a job with the Springfield Sanitation Plant for about 6 weeks, then as a janitor at Rosenwall Junior High for a short period. Following this he went

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[8] The district court judge -- a trial judge who has heard the testimony of a number of mental health experts -- characterized Dr. Warner's testimony as "very effective" (Supp. R-34). Of course, despite the compelling nature of this testimony, it could not be "effective" because the jury received no instructions allowing consideration of this evidence and the trial judge limited his consideration to the statutory mitigating factors.

> to central Florida, harvesting citrus fruit and worked for short periods of time with Strickland Construction Company, Cohen Brothers of Tampa and Morgan Yacht Company, finishing the inside of yachts and then to Interspace Corporation making water pipes.

(Report of John F. Mason, M.D.) (emphasis added).

All of this evidence was classically mitigating. Evidence is "'mitigating' [when it] might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4-5, quoting, Lockett, 438 U.S. at 604. Military service establishes valid mitigation, see e.g., Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987)(wounded Viet Nam veteran); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983), and Mr. Jackson's service was substantial. Mr. Jackson was in the Army for eight years, served three tours of duty in combat in Viet Nam, was discharged under honorable conditions, was wounded and decorated, and received veterans' benefits.

Mr. Jackson's amenability to incarceration also is valid mitigation, as this Court held in Skipper, 476 U.S. at 4-5. As a result of his religious beliefs, Mr. Jackson could "accept being in jail, in the sense of tolerating it and not trying to make trouble or not trying to stir up anything or not trying to break out or not trying to do any of that sort of thing" (R. 748-49). Likewise, evidence that a capital defendant had continuously attempted to be gainfully employed and had recognized and attempted to overcome his difficulties is mitigating, as is evidence that the defendant was not violent.

C. This Court's Standard of Review and Its Application in the Eleventh Circuit

In light of the substantial mitigation in this case, it cannot be "confidently conclud[ed]" that the Hitchcock error was harmless beyond a reasonable doubt, Skipper, 476 U.S. at 8, and the Court of Appeals so found. The eighth amendment requires that capital sentencing proceedings be individualized and reliable and thus that capital sentencers "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (emphasis in original). This requirement is necessary in order to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 605. This Court has in fact cautioned that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer," Satterwhite v. Texas, 108 S. Ct. 1792, 1798 (1988), and thus that review of errors in such proceedings requires the strict application of the standard that the State must prove harmlessness beyond a reasonable doubt.

Not only is the Chapman standard the one which the Court of Appeals applied here, the Eleventh Circuit has consistently applied that standard to the review of cases involving Hitchcock error, and this Court has never indicated that the Court of Appeals has been acting improperly in applying this Court's harmless error standard. Most recently this Court denied

certiorari review in Singletary v. Booker, 111 S.Ct. ___ (1991), previous history, Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (applying the same standard of harmless error review as the one applied in Carl Jackson's case). The pendency of a certiorari petition filed by the Florida Attorney General in Booker was relied on by the Attorney General's request for certiorari review in Mr. Jackson's case.

The Eleventh Circuit has found Hitchcock errors to be harmless, see Tafero v. Dugger, 873 F.2d 249, 252 (11th Cir. 1989) (error harmless where "[t]he factors presented by Tafero contain little mitigating value"), cert. denied, 110 S.Ct. 1834 (1990); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982 (1988), while in cases, like this one, where the error had an effect on the verdict, the Court has found that the State has not established harmlessness beyond a reasonable doubt. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, 110 S.Ct. 2628 (1990). See also Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (same), cert. denied, 111 S.Ct. ___ (1991).[9]

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[9] The standard was discussed by the Eleventh Circuit in this case, see Jackson, 931 F.2d 716-17, in explaining, inter alia, that "[i]f the Hitchcock error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed" and that "[a] Hitchcock violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory

- (continued...)

This Court has not previously reversed the Eleventh Circuit Court of Appeals' application of the Skipper/Satterwhite/Chapman standard in either category of cases. See Booker, 111 S.Ct. ___ (denying certiorari); Delap, 110 S.Ct. 2628 (denying certiorari); Tafero, 110 S.Ct. 1834 (denying certiorari); Demps, 110 S.Ct. 1834 (denying certiorari); Clark, 485 U.S. 982 (denying certiorari). And the mitigating evidence in this case is reliable, credible, valid, and "significant" mitigation; it would affect the decision of a reasonable jury; but the jury here was not allowed to consider it. Jackson, 931 F.2d at 717-19.

As in Hitchcock itself, there was mitigation here which the jury should have been allowed to consider, but the jurors were not allowed to "give effect" to the mitigation. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). The mitigating evidence in this case is "significant." Jackson, 931 F.2d at 717-19. The State's efforts to downplay it, we submit, do not undermine the Court of Appeals' reasoned ruling.

D. The State's Efforts To Downplay The Mitigation

The Attorney General does not dispute that Mr. Jackson served in the military for eight years, that he spent three tours of combat duty in VietNam, or that Mr. Jackson was wounded (including a chest wound) during combat duty. These facts alone speak volumes regarding the mitigating nature of Mr. Jackson's

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[9](...continued)
mitigating evidence ... that was not considered ... would not have influenced the jury to recommend a life sentence."

military service, as the Court of Appeals found.[10]

Despite the significant facts reflected by this record, the State attempted before the Court of Appeals, and now attempts, to characterize Mr. Jackson's military service as less than honorable, a gross mischaracterization. The State's argument does not comport with the facts. At the time he left the service, Mr. Jackson received a discharge under honorable conditions. There are five kinds of military discharges, divided into two categories. See Army Regulation (AR) 635-200, Chapter 3. The category of "administrative" discharges includes "honorable," "general under honorable conditions," and "other than honorable" discharges. Id. The category of "punitive" discharges includes "bad conduct" and "dishonorable" discharges. Id.

The criteria for awarding the different kinds of discharges themselves reflect the mitigating nature of Mr. Jackson's military service.

A characterization of under honorable conditions

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[10] As discussed herein, contrary to the State's suggestion (Petition, p. 5), Mr. Jackson was discharged under honorable conditions and was entitled to full military benefits and honors because of his service. Moreover, defense counsel presented evidence relating to Mr. Jackson's military service at sentencing and wanted the jury to consider the evidence. Counsel obviously did not believe that Mr. Jackson's service "would not have helped his case at all" (Petition, p. 5), but rather believed that the sentencers should have been allowed to consider it as a basis for a sentence of life. The sentencers, however, were not allowed to consider it. During post-conviction proceedings, counsel indicated that she did not believe there was a reason to introduce additional evidence about Mr. Jackson's service, an observation which makes sense in light of the fact that she had already introduced "significant" evidence of Mr. Jackson's service, See Jackson, 931 F.2d at 717-19.

> may be issued only when the reason for the soldier's separation specifically allows such characterization.

AR 635-200, Chapter 3-7 ("General Discharge" under honorable conditions). Mr. Jackson received his discharge under honorable conditions only because he earned it: only because Mr. Jackson's case "specifically allow[ed] such characterization." Significantly, Mr. Jackson's discharge was not "under other than honorable conditions," a characterization which requires serious acts of misconduct, see AR 635-200, Chapter 3-7 ("Discharge under other than honorable conditions"), it was a discharge under "honorable conditions."

Moreover, contrary to the State's mischaracterization, Mr. Jackson did not receive any of the "punitive" discharges. These discharges -- "dishonorable" and "bad conduct" -- are given only after a court martial, see AR 635-200, Chapter 3-10, 11, and require involuntary expulsion from the Army. AR 635-200, Chapter 3-13. Mr. Jackson's case is thus strikingly unlike Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), on which the State relies and in which the Eleventh Circuit Court of Appeals found the sentencing jury's failure to consider the defendant's military background harmless because the defendant was "dishonorabl[y] discharged," 874 F.2d at 1390, never served in combat or overseas, id., had been court-martialed, 874 F.2d at 1390, and in whose case the discharge had been later upgraded because of a "special discharge review program." Id. The State's argument and the Demps case were in fact specifically discussed in the opinion of the Court of Appeals in Mr. Jackson's case (this discussion is quoted below). The Court of Appeals concluded that

the Hitchcock error was harmless in Demps because the lack of quality of Mr. Demps' service would not have influenced a reasonable jury to vote for life; the Court of Appeals concluded that the error was not harmless beyond a reasonable doubt in Mr. Jackson's case because the quality of his military service was "significant" and would influence a reasonable jury. Mr. Jackson received his discharge under honorable conditions at the time of his separation from the Army because he earned it -- the characterization of his discharge was earned on the basis of his service record and was not the result of a special dispensation, as was the case in Demps.

That the quality of Mr. Jackson's service establishes valid mitigation, while the service in Demps did not, is also evident from the differences in benefits available after discharge:

> 3-6. Separation as it affects the soldier
>
> Both the honorable and general discharges entitle a soldier to full Federal rights and benefits provided by law.
>
> * * *
>
> A Dishonorable Discharge deprives the soldier of all veterans benefits and may deprive him or her of civil rights.

AR 635-200, Chapter 3-6 (emphasis added). If Mr. Jackson's service record were as poor as the State contends, Mr. Jackson would not have received a discharge entitling him "to full Federal rights and benefits provided by law."

The State's protestations to the contrary notwithstanding, Mr. Jackson's military service established valid mitigation. The State has never disputed that Mr. Jackson served in the Army for

eight years, spent three tours of duty in combat in VietNam, and was wounded during his VietNam service. The disputes raised by the State were considered and found lacking by the Court of Appeals. And they are contrary to the record.[11] Mr. Jackson's military service established valid mitigation, and the jury's and judge's failure to consider it can not be deemed harmless beyond a reasonable doubt, as the Court of Appeals found:

> We believe that Jackson's military service is in and of itself a significant mitigating circumstance.... The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In Demps, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this court stated "that the record reflects no evidence indicating any overseas combat experience." Id. at 1390. Thus, the Demps court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.
>
> We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation. We do no hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance. We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's

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[11] The few times the State did refer to the record before the Court of Appeals, the State misrepresented what the record actually reflects. For example, the State argued that Dr. Cleo Warner testified "that Jackson's less-than-honorable discharge would cost him some veteran's benefits. (TR 746)" (Answer Brief at 9). In fact, Dr. Warner testified that Mr. Jackson received a "general discharge under honorable conditions," which Dr. Warner believed entitled Mr. Jackson to receive Veteran's benefits (R. 746). Nowhere did Dr. Warner testify that Mr. Jackson had lost any veteran's benefits.

> recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

Jackson v. Dugger, 931 F.2d at 716-18 (emphasis added).

E. The Analysis of the Court of Appeals

The situation in Mr. Jackson's case parallels the facts on which this Court granted relief in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), which reaffirmed the principles of Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). In Penry, the jury was instructed in accordance with the Texas death penalty statute that it was to determine the sentence on the basis of its answers to three special issues: whether the defendant acted deliberately in committing the murder; whether there was a probability that he would be dangerous in the future; and whether he acted unreasonably in response to provocation. Penry, 109 S. Ct. at 2947. Petitioner Penry argued that the failure to provide the jury with additional instructions precluded the jury from considering the evidence in mitigation. Although the State Respondent in Penry argued that the petitioner was able to argue the significance of his mitigation to the jury, id. at 2950, this Court concluded:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering

> its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965; Eddings, 455 U.S., at 119, 102 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Penry, 109 S. Ct. at 2952 (emphasis added).

In Penry, relief was granted because the evidence argued in mitigation could not be fit into the special issues upon which the jury was instructed. Thus, the jury was provided no "vehicle" by which it could "full[y] consider" and "give effect to mitigating evidence relevant to a defendant's character or record...." Penry, 109 S. Ct. at 2951. The same is true in Mr. Jackson's case.

In Hitchcock, as in Penry and as here, defense counsel tried to provide the mitigation to the jury. See Hitchcock, 107 S.Ct. at 1824 ("look at the overall picture ... consider everything together ... consider the whole picture, the whole ball of wax"). In Hitchcock, a case concededly involving the same error as the one in Mr. Jackson's case, this Court unanimously concluded that the error "could not be clearer." 107 S.Ct. at 1824. And in Mr. Jackson's case, a case involving "significant" mitigating evidence, the Court of Appeals could not "confidently conclude" that the error had "no effect" on the sentencers' deliberations. See Skipper v. South Carolina, 476 U.S. at 8.

The Court of Appeals' opinion plainly stated its adherence to this Court's precedents, which it cited and discussed;

related its full review and consideration of the record in this case; and discussed the State's arguments and the reasons why they were insufficient to overcome Mr. Jackson's entitlement to relief. Indeed, the arguments now raised by the State are each rebutted by the Court of Appeals' analysis:

> Jackson contends that his sentencing hearing violated Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), because the jury was instructed to consider only statutorily enumerated mitigating circumstances and because the judge did not consider nonstatutory mitigating circumstances in sentencing Jackson to death. In Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Supreme Court held that an advisory jury may not be prohibited from considering relevant nonstatutory mitigating circumstances in making its sentencing recommendation and that the judge must consider relevant nonstatutory mitigating circumstances in determining an appropriate sentence. Id. at 398-99, 107 S.Ct. at 1824. The Court concluded that a jury's and judge's failure to consider such mitigating evidence violates the principles announced in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 10, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). Id.
>
> In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court found, that Jackson's sentencing hearing violated Hitchcock. The trial court's jury instructions were almost identical to those given in Hitchcock. We conclude that the jury, in violation of Hitchcock, was not permitted to consider nonstatutory mitigating circumstances in making its recommendation.
>
> We also conclude that the trial judge did not consider nonstatutory mitigating circumstances in sentencing Jackson. In support of this conclusion we note that the trial judge instructed the jury only to consider statutory mitigating circumstances. A trial court is presumed to follow the instructions given to the jury. See Daugherty v. Dugger, 839 F.2d 1426 (11th Cir.) cert. denied, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); Ziegler v. Dugger, 524 So.2d 419 (Fla. 1988). Additionally, the trial court's sentencing order referred to "insufficient mitigating circumstances as enumerated in Subsection (7) of said

Section 921.141 ...." R.S. 13. This was almost identical to the sentencing order in Hitchcock. See Hitchcock, 481 U.S. at 398, 107 S.Ct. at 1824. The sentencing order does not mention nonstatutory mitigating circumstances. Furthermore there were no on-the-record statements by the trial judge indicating that he would consider nonstatutory circumstances. These factors support our conclusion that the trial judge did not consider nonstatutory mitigating circumstances, in violation of Hitchcock.

Although we conclude that a Hitchcock violation occurred, that does not automatically require a reversal of Jackson's sentence. If the Hitchcock error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed. Se, e.g., Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). A Hitchcock violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory mitigating evidence regarding the defendant's character that was not considered by the jury would not have influenced the jury to recommend a life sentence. See Demps v. Dugger, 874 F.2d 1385, 1390 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Nonstatutory mitigating evidence not considered by the jury affects the jury's recommendation if it amounts to a significant mitigating circumstance. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, ___ U.S. ___, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); Tafero v. Dugger, 873 F.2d 249, 252 n.4 (11th Cir. 1989) (per curiam) (error harmless where "[t]he factors presented by Tafero contain little mitigating value."), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 962 (1990); Jones v. Dugger, 867 F.2d 1277, 1279 (11th Cir. 1989) ("resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant....").

The State of Florida concedes that nonstatutory mitigating evidence was presented to the jury but maintains that this mitigating evidence was so insignificant that even if the jury could have considered it, they would not have been affected by it and the sentence recommendation would have been the same. Therefore, the State argues, the Hitchcock error was harmless beyond a reasonable doubt. This was the position taken by the Supreme Court of Florida when it

reviewed Jackson's Hitchcock claim. See Jackson v. Dugger, 529 So.2d 1081, 1082 (Fla. 1989). The court stated that "[v]iewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder." Id.

The State of Florida argues that this court is bound by the supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982), cert. denied, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). See also Booker v. Dugger, 922 F.2d 633, 636 n.4 (11th Cir. 1991).

Jackson asserts that he produced significant evidence of nonstatutory mitigating circumstances. He points to evidence that he had served in the military for eight years; he served overseas, including three tours of combat duty in Vietnam; he was wounded in the chest while in n Vietnam; he was a religious person; he had no history of prior violence; he had attempted to go to college; and he was amenable to incarceration.

After reviewing the transcript of the sentencing hearing, we conclude that Jackson's military service is a significant nonstatutory mitigating circumstances that the jury was not allowed to consider. A psychologist, who interviewed Jackson, testified that, "I believe he [Jackson] told me he was in the army for eight years.... He said that he was in Vietnam three times and on each of those occasions he was in a combat situation for [a] fairly lengthy period of time." Sentencing Transcript at 741-42.

We believe that Jackson's military service is in and of itself a significant mitigating circumstance. We therefore need not decide whether the other evidence presented by Jackson was significant. The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In Demps, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this

> court stated "that the record reflects no evidence indicating any overseas combat experience." Id. at 1390. Thus, the Demps court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.
>
> We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation. We do not hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance. We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

Jackson v. Dugger, 931 F.2d 712, 716-18 (11th Cir. 1991) (footnote omitted).

ARGUMENT IN RESPONSE

In light of the discussion presented above, the State's arguments in support of its petition for writ of certiorari do not overcome the propriety of the Eleventh Circuit's ruling and do not state a ground sufficient to warrant certiorari review. The Court of Appeals carefully considered and applied this Court's settled precedents. It did not overlook any of the relevant facts. It fully addressed each of the arguments which the State presented. And it thoughtfully applied this Court's law to the undisputed facts and circumstances of this case.

The Attorney General's petition expresses the State's displeasure at the Court of Appeals' ruling, but that displeasure

surely does not support a grant of the State's certiorari petition. The State's specific arguments are addressed below.

(I)

The State first asserts that "certiorari should be granted to decide the standard to be applied in determining the harmlessness of [a] violation of Hitchcock v. Dugger" (Petition, p. 6). Hitchcock error, like the errors at issue in Lockett, Eddings, Penry, and Skipper, is the eighth amendment error resulting from a restriction on the sentencers' consideration of relevant evidence in mitigation of a death sentence. As discussed above, this Court has expressly held that the eighth amendment standard to be applied to capital sentencing error is one of harmlessness beyond a reasonable doubt. See Satterwhite v. Texas (discussed above). In the context of a restriction of the sentencers' consideration of mitigation, this Court explained in Skipper that relief was warranted because the Court could not "confidently conclude" that the error had no effect on the jury's deliberations.

This standard -- of harmlessness beyond a reasonable doubt -- is the one which the Court of Appeals expressly applied to the undisputed error, involving a prohibition on the consideration of relevant mitigation, which occurred during the proceedings resulting in Carl Jackson's sentence of death. See Jackson, 931 F.2d at 716-18. As discussed above, the Court of Appeals has consistently applied the standard, finding that in some cases that the error is harmless beyond a reasonable doubt, e.g., Demps; Tafero; Clark (discussed above), and in others that

it is not. Delap; Booker (discussed above).[12] This Court has disturbed none of these rulings of the Court of Appeals.[13]

Contrary to the State's suggestion, there is a "standard of 'harmless error' review ... recognized to guide the federal courts during [section] 2254 proceedings" in cases involving a restriction on the sentencers' consideration of relevant mitigating factors. The standard is the one which the Court of Appeals for the Eleventh Circuit has consistently applied in such cases, and the one which it applied in this case. See Jackson, 931 F.2d at 717-18.[14]

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[12] The Attorney General's statement that "[i]n other cases, the Eleventh Circuit rejected any claim of 'harmless error' without discussion or analysis" (Petition, p. 6), is somewhat misleading. As the Court of Appeals' opinions in the cases listed by the petition in support of this proposition show, see, e.g., Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (in banc), cert. denied, 489 U.S. 1071 (1989), these cases did not involve an argument by the State that the error was harmless, but, as in Hitchcock itself, involved arguments that there was no error or, as in Hargrave, arguments premised on an alleged procedural bar. As in Hitchcock itself, because the State presented no harmless error argument in these cases, the reviewing court found that there was no reason to undertake an analysis of harmless error issues.

[13] In this regard, as noted above, Respondent notes that this Court recently denied the State's certiorari petition in Singletary v. Booker, Case No. 90-1778, 111 S.Ct. ___ (1991), a petition on which the State relied in its application for certiorari review in this case.

[14] Notwithstanding the State's suggestion (Petition, p. 7), there exists no "intracircuit conflict" in the Eleventh Circuit in cases, such as Mr. Jackson's, involving a restriction on the jury's consideration of "significant" mitigating evidence. Although panels of the Eleventh Circuit have discussed the potential difficulties in properly applying the "harmless beyond a reasonable doubt standard" in those cases involving weak, unreliable, or insubstantial mitigation -- difficulties akin to the ones which this Court spoke to in Satterwhite, because of the discretion that is afforded capital sentencers -- the Court of Appeals has consistently noted that there is no difficulty in

(continued...)

(II)

The State also writes that "certiorari should be granted pursuant to the supervisory power of this Court to create and enforce a consistent standard of review and to enforce the standards set down by this Court in Anderson v. Bessemer City[, 470 U.S. 504 (1985).]" (Petition, p. 8). In support of this contention the State argues, without explanation or citation, that the Eleventh Circuit granted relief "without reference to any evidence relied upon by the district court" (Petition, p. 8). The District Court, however, neither conducted a hearing nor made findings of fact. No evidence "relied on" by the District Court which the Court of Appeals ignored is discussed in the State's petition and no factual findings of the District Court which were overlooked by the Court of Appeals are listed. The District Court made no findings of fact adverse to Mr. Jackson; did not contest the existence, reliability, relevancy, and veracity of the mitigating evidence; and as the District Court's general ruling reflects (see Petitioner's App. A-47), the Court did not base its decision on a finding of fact.

Similarly, the State provides no support for its assertions that the Court of Appeals "engaged in appellate trial de novo" and that it ignored "all prior proceedings" (Petition, p. 8). The Court of Appeals undertook a careful examination of the

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[14](...continued)
cases such as Mr. Jackson's, involving "significant" mitigation which would affect a reasonable sentencer but which the sentencer is not allowed to consider. It is also noteworthy that in cases involving weak, unreliable, or insubstantial mitigation, the Court of Appeals has found the errors harmless. See, e.g., Tafero; Demps.

record, including the record of the proceedings "actually conducted," cf. Hitchcock; considered the State's arguments;[15] and only thereafter concluded that based on the record of these proceedings "Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation" and that the error could not be found harmless beyond a reasonable doubt in this case. Jackson, 931 F.2d at 717-18.

The State's concluding argument in this subsection -- that District Court rulings as to whether a federal constitutional error is harmless beyond a reasonable doubt should be subjected to a "clearly erroneous" standard of review in the Court of Appeals -- requires no elaborate response. The "clearly erroneous" standard of review applies to findings of fact, not conclusions of law, as the Court of Appeals discussed in rejecting the State's argument, Jackson, 931 F.2d at 717, and as this Court has explained on a number of occasions. See Introduction and Statement of the Case, supra (discussing Townsend v. Sain, Miller v. Fenton, and other decisions). See also Brewer v. Williams, 430 U.S. 387 (1977) (questions of federal constitutional law are subject to independent review); Cuyler v. Sullivan, 446 U.S. 335 (1980) (same); Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982) (same), cert. denied, 461 U.S. 948 (1983); Booker v. Dugger, 922 F.2d 633, 636

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[15] Indeed, the Court provided a recitation of why Mr. Jackson's service was of significance in its mitigating value while the military service in Demps v. Dugger was not, Jackson, 931 F.2d at 717, and carefully considered and accounted for each of the State's other arguments. Id.

n.4 (11th Cir. 1991) (same, as to the error resulting from the restriction on the jury's consideration of mitigating evidence), cert. denied sub nom. Singletary v. Booker, 111 S.Ct. ___ (1991).

(III)

The State's final argument is that "certiorari should be granted to resolve the recurring conflict over whether state court findings of harmless error, reviewed federally pursuant to 28 U.S.C. §2254, are entitled to the same deference as federal district court findings of harmless error reviewed pursuant to 28 U.S.C. § 2255 ...." (Petition, p. 10). The State presents no cases even remotely on point for its proposition that different review is afforded by the federal courts to cases arising under 28 U.S.C. section 2254 than the review afforded to cases under section 2255. Rather, as even the cases on which the State relies explain:

> [T]he procedural devices provided to make an evidentiary hearing unnecessary are nearly identical in the rules pursuant to [section] 2254 and [section] 2255 respectively.

Farrow v. United States, 580 F.2d 1339, 1353 (9th Cir. 1978).

The State further argues, as it did before the Court of Appeals, that deference was due to the Florida Supreme Court's ruling of harmless error. The Court of Appeals expressly rejected this argument. See Jackson, 931 F.2d at 717 ("'[T]he ultimate determination of whether federal constitutional error is harmless is a federal question' and therefore federal courts are not bound by state court determinations of what constitutes harmless error.")

Florida law ascribes the capital sentencing decision

strictly to the jury and judge. The jury and judge here were restricted in the consideration of "significant" mitigating evidence. No sentencing body has ever considered the significant evidence in mitigation in this case. The Florida Supreme Court has held that it does not engage in appellate resentencing and does not reweigh evidence of aggravating and mitigating circumstances when it reviews capital cases. See Hudson v. State, 538 S.2d 829, 831 (Fla. 1989); Brown v. Wainwright, 392 So.2d 1327, 1331-32 (Fla. 1981); see also Parker v. Dugger, 111 S.Ct. 731, 738 (1991) ("[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances.") When it ruled in Mr. Jackson's case, the Florida Supreme Court neither reweighed the aggravating and mitigating circumstances nor engaged in appellate resentencing. Here, as in Booker, "[t]aken as a whole, the Florida Supreme Court's opinion demonstrates that the court only intended to undertake harmless error analysis of the Hitchcock error -- an analysis that the court conducts in its capacity as a pure reviewing court under ... Chapman v. California." Booker v. Dugger, 922 F.2d at 645 (Tjoflat, C.J., concurring), cert. denied sub nom Singletary v. Booker, 111 S.Ct. ___ (1991).

Although "state court findings of fact are entitled to deference in the federal courts" (Petition, p.-13), this case involves no overlooked state court findings of fact. There is no question about the veracity of Mr. Jackson's military service and there is no question that the sentencers (the jury and judge)

never considered it. The question of whether a federal constitutional error is harmless is a federal question. The Attorney General overlooks this settled standard of federal review. Because the State overlooks it, its arguments have no application to this case.

CONCLUSION

Neither a substantial nor a debatable question is presented by the State's petition, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 22nd day of October, 1991.

Attorney

BY THE COURT:

Appellees' motion to withdraw the petition for rehearing and suggestion for rehearing en banc is GRANTED. As the case has settled, the opinion at 922 F.2d 712 is vacated, the judgment of the district court is vacated and the case is remanded to the district court with direction that the case be dismissed.

Carl JACKSON, Petitioner-Appellant,

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 90-3237.

United States Court of Appeals, Eleventh Circuit.

April 29, 1991.

Following affirmance, 359 So.2d 1190, of convictions of robbery, kidnapping and two counts of first-degree murder and sentence of death, petitioner sought writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 90-50069, C. Roger Vinson, J., denied relief and petitioner appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel, and (2) trial court erred in instructing jury to consider only statutorily enumerated mitigating circumstances and in failing to consider nonstatutory mitigating circumstances.

Affirmed in part, reversed and remanded in part.

1. Criminal Law ⇐641.13(7)

Where matters complained of were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal, and therefore was not deficient in failing to attempt to do so. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1030(1)

Under Florida law, failure of trial counsel to object at trial bars appellate review unless error constitutes "fundamental error."

3. Criminal Law ⇐796

State trial court erred in instructing jury to consider only statutorily enumerated mitigating circumstances and in failing to consider nonstatutory mitigating circumstances in sentencing defendant in capital case.

4. Criminal Law ⇐1172.9

Instruction allowing jury to only consider statutory mitigating circumstances is harmless error if court can conclude beyond a reasonable doubt that nonstatutory mitigating evidence regarding defendant's character that was not considered by the jury would not have influenced jury to recommend life sentence; nonstatutory mitigating evidence not considered by jury affects jury's recommendation if it amounts to significant mitigating circumstances.

5. Habeas Corpus ⇐452, 770

Ultimate determination of whether federal constitutional error is harmless is a federal question, and federal courts are not bound by state court determinations of what constitutes "harmless error."

6. Criminal Law ⇐796, 1172.9

Instruction that jury could not consider nonstatutory mitigating circumstances in recommending sentence in capital case was not harmless; defendant's military service was a significant nonstatutory mitigating circumstance.

Billy H. Nolas, Gail Anderson, Julie D. Naylor, Tallahassee, Fla., for petitioner-appellant.

Mark Menser, Asst. Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before JOHNSON, EDMONDSON and COX, Circuit Judges.

COX, Circuit Judge:

On April 20, 1975, Carl Jackson robbed a convenience store and murdered the clerk, Ann Butler. In the process of leaving, Jackson kidnapped Mary Price and later murdered her. He was convicted in a Florida court of robbery, kidnapping and two counts of first-degree murder. He was sentenced to death for the murders. He ultimately attacked his convictions and death sentence by a 28 U.S.C. § 2254 petition filed in the Northern District of Florida. The district court denied relief and Jackson appeals. We affirm the district court's denial of relief as to Jackson's convictions, but reverse the district court's denial of relief relative to his death sentence.

I. FACTS AND PROCEDURAL HISTORY [1]

On the morning of April 20, 1975, Carl Jackson persuaded Jimmy Harris, a friend, to drive Jackson to a Jr. Food Store in Bay County, Florida. Once Jackson went into the store, Harris, not wanting to become further involved, drove away leaving Jackson stranded. Jackson proceeded to rob the store. During the robbery he shot and killed Ann Butler, the store clerk on duty. While Jackson was committing the robbery, Mr. and Mrs. Price, on their way to Sunday church services, stopped at the store. Mr. Price went into the store, leaving his car keys in the ignition and Mrs. Price in the car. Jackson, unseen by Mr. Price, exited the store and, realizing that Harris had left him stranded, commandeered the Prices' car with Mrs. Price in it. Mr. Price found the items he wanted and went to the counter to pay for them. At the counter he found Mrs. Butler lying on the floor dead. After calling the police Mr. Price noticed that Mrs. Price and the car were gone.

Jackson drove the Prices' car a short distance to a secluded area. Once there, he shot and killed Mrs. Price. Jackson then abandoned the car. Although there was no direct evidence that Jackson committed these acts, there was overwhelming circumstantial evidence including one of Jackson's fingerprints in the Prices' car, his bloody jacket near the car, and the testimony of Jimmy Harris.

After an investigation, Jackson was indicted and tried for the murders of Mrs. Butler and Mrs. Price, the kidnapping of Mrs. Price and the robbery of the Jr. Food Store. The jury found Jackson guilty on all four counts. A sentencing hearing was held to determine whether Jackson should be sentenced to death or life imprisonment for the murders.[2] Under Florida law, both aggravating and mitigating circumstances could be presented at the hearing. The State, relying on the evidence produced at trial to establish several aggravating circumstances, produced no additional evidence. The defense introduced the testimony of four witnesses. Part of that testimony indicated that Jackson had served eight years in the military, including three tours of combat duty in Vietnam.

The jury, by a vote of 11-1, recommended that Jackson be sentenced to death. The trial judge, after finding five aggravating [3] and no statutory mitigating circumstances, sentenced Jackson to death. Jackson appealed to the Supreme Court of Florida. The supreme court, after striking

1. This statement of the facts is based upon the Supreme Court of Florida's summary of the evidence at trial. *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

2. Jackson was sentenced to life imprisonment on the robbery charge and fifteen years imprisonment on the kidnapping charge.

3. The five aggravating circumstances found by the court were: (1) the murder of Ann Butler was committed during the course of a robbery; (2) the murder of Ann Butler was committed for pecuniary gain; (3) the murder of Mary Price was committed while Jackson was fleeing after the robbery; (4) the murder of Mary Price was committed during a kidnapping; and (5) the two murders were committed to avoid a lawful arrest.

one of the aggravating circumstances,[4] affirmed his convictions and sentence, *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), and the United States Supreme Court denied certiorari. *Jackson v. Florida*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

Jackson then filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court rejected all of Jackson's claims and the Supreme Court of Florida affirmed that ruling. *Jackson v. State*, 437 So.2d 147 (Fla.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1016, 79 L.Ed.2d 246 (1984). After a death warrant was signed, Jackson filed a second Rule 3.850 motion. Additionally, Jackson filed a petition for a writ of habeas corpus in the Supreme Court of Florida. The trial court again rejected Jackson's Rule 3.850 claims. The supreme court affirmed the trial court's ruling and also denied Jackson's petition for habeas corpus relief. *Jackson v. State*, 452 So.2d 533 (Fla.1984).

In June 1984, Ella Mae Wilson filed, on Jackson's behalf, a "next friend" petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court, after initially staying the petition, dismissed it without prejudice to allow Jackson to exhaust his state remedies regarding the claim that his sentencing hearing violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Thereafter, Jackson filed a second petition for a writ of habeas corpus in the Supreme Court of Florida alleging that his sentencing hearing violated *Hitchcock*. The supreme court determined that Jackson's sentencing hearing violated *Hitchcock* because the trial court's instructions precluded the jury from considering nonstatutory mitigating circumstances in determining Jackson's sentence. The court, however, concluded that any error that resulted from such a violation was harmless beyond a reasonable doubt because the nonstatutory mitigating evidence was "minimal." *Jackson v. Dugger*, 529 So.2d 1081, 1082 (Fla.1988).

In July 1989, Jackson filed a third petition for a writ of habeas corpus in the Supreme Court of Florida alleging five claims. The supreme court denied the petition without opinion. *Jackson v. Dugger*, 554 So.2d 1168 (Fla.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3294, 111 L.Ed.2d 803 (1990).

Jackson then filed this petition for a writ of habeas corpus in the Northern District of Florida alleging seventeen claims.[5] The

4. The aggravating circumstance struck by the supreme court was that the murder of Mrs. Butler was committed for pecuniary gain.

5. Jackson's petition raised seventeen claims. We will number the claims as did Jackson's petition. Six of Jackson's claims sought to overturn his convictions: (7) a claim that he received ineffective assistance of counsel during the guilt/innocence phase of his trial; (8) a claim that he received ineffective assistance of counsel on direct appeal; (14) a claim that jurors were dismissed in violation of the principles announced in *Witherspoon v. Illinois;* (15) a claim of improper argument by the prosecution during the guilt phase of the trial; (16) a claim that admission of testimony to the effect that Jackson requested an attorney during a custodial interrogation, and the prosecutor's comment on Jackson being provided an attorney after his arrest, violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments; and (17) a claim that photographic evidence was improperly admitted at trial.

The remaining eleven of Jackson's claims challenged his death sentence: (1) a claim that he was sentenced in violation of the principle stated in *Hitchcock v. Dugger*; (2) a claim that there was an improper argument by the prosecutor during the sentencing phase of the trial which created a "presumption of death"; (3) a *Booth v. Maryland* claim; (4) a claim that the trial court erred by not finding the mitigating circumstance of "no significant criminal history"; (5) a claim that he received ineffective assistance of counsel during the sentencing phase of the trial; (6) a second *Hitchcock v. Dugger* claim (*Hitchcock* error restricted defense counsel's efforts); (9) a claim that the trial court failed to provide a factual basis for imposition of the death penalty; (10) a claim that the Supreme Court of Florida erred by not ordering a new sentencing hearing after striking one aggravating circumstance; (11) a claim that the trial court misapplied (doubled) aggravating circumstances in sentencing Jackson; (12) a claim that the avoiding arrest aggravating circumstance was misapplied; and (13) a claim that the jury was misinstructed on the number of votes required to recommend life imprisonment.

district court determined that Jackson's sentencing was in violation of the principle announced in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The district court considered the harmless error issue a "very close question," but concluded that the *Hitchcock* violation was harmless beyond a reasonable doubt. (R.4–5). The court then determined that none of the remaining claims were "sufficiently meritorious to warrant issuance of the writ." *Id.* The court, however, issued a certificate of probable cause to appeal, specifically focusing on the claim that Jackson's sentencing hearing violated *Hitchcock*. Jackson now appeals the district court's denial of relief on eight of his seventeen claims.[6]

II. DISCUSSION

A. Claims Relating to Conviction

Jackson appeals the denial of relief on only one claim that relates to his convictions. It is the claim that he was denied effective assistance of counsel on direct appeal in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Claims of ineffective assistance of counsel are governed by the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The defendant must satisfy both parts of this standard to be entitled to relief.

Jackson argues that his appellate counsel was deficient in failing to raise two issues on direct appeal that would have resulted in the reversal of his convictions. First, he argues that his appellate counsel was deficient in failing to assert on direct appeal that potential jurors were dismissed by the trial court in violation of the principles announced in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When presented with an identical claim, the Supreme Court of Florida found that this issue was not preserved for appellate review because no objection to dismissal of these jurors was asserted in the trial court. *Jackson v. State*, 452 So.2d 533, 536 (Fla.1984).

[1, 2] Jackson also argues that appellate counsel was deficient in failing to assign as error prejudicial closing arguments made by the State during the guilt/innocence phase of the trial. The record in this case does not include a transcript of the guilt/innocence phase of the trial, but Jackson's petition includes excerpts from the transcript which set forth the arguments complained of. These excerpts do not reflect any objection on the part of trial counsel to the arguments in question. Additionally, Jackson, in another part of his petition, specifically asserts that counsel failed to object to these arguments. R.1–4–157, 158. Under Florida law, failure to assert appropriate objections at trial bars review on appeal.[7] *Wilson v. State*, 436 So.2d 908, 910 (Fla.1983); *State v. Cumbie*, 380 So.2d 1031, 1033 (Fla.1980); *Clark v. State*, 363 So.2d 331, 333 (Fla.1978).

Since the matters complained of in this case were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal and therefore was not deficient in failing to attempt to do so. *Bertolotti v. Dugger*, 883 F.2d 1503, 1523 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). Because Jackson has failed to show that appellate counsel was deficient, the district court properly denied relief on the claim that he received ineffective assistance of counsel on direct appeal.

6. Jackson appeals the district court's denial of relief on only one claim that relates to his convictions—claim (8). He also appeals the denial of relief on seven claims that challenge his death sentence: claims (1), (2), (3), (5), (9), (10) and (12).

7. The general rule under Florida law is that failure of trial counsel to object at trial bars appellate review. The sole exception to this rule is when the error constitutes "fundamental error." *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978). Jackson does not either in his petition or brief on appeal contend that the arguments complained of presented "fundamental error."

B. Claims Relating to Sentence

i. *Hitchcock Claim*

[3] Jackson contends that his sentencing hearing violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), because the jury was instructed to consider only statutorily enumerated mitigating circumstances and because the judge did not consider nonstatutory mitigating circumstances in sentencing Jackson to death. In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Supreme Court held that an advisory jury may not be prohibited from considering relevant nonstatutory mitigating circumstances in making its sentencing recommendation and that the judge must consider relevant nonstatutory mitigating circumstances in determining an appropriate sentence. *Id.* at 398–99, 107 S.Ct. at 1824. The Court concluded that a jury's and judge's failure to consider such mitigating evidence violates the principles announced in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). *Id.*

In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court found, that Jackson's sentencing hearing violated *Hitchcock*. The trial court's jury instructions were almost identical to those given in *Hitchcock*.[8] We conclude that the jury, in violation of *Hitchcock*, was not permitted to consider nonstatutory mitigating circumstances in making its recommendation.

We also conclude that the trial judge did not consider nonstatutory mitigating circumstances in sentencing Jackson. In support of this conclusion we note that the trial judge instructed the jury only to consider statutory mitigating circumstances. A trial court is presumed to follow the instructions given to the jury. *See Daugherty v. Dugger*, 839 F.2d 1426 (11th Cir.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla.1988). Additionally, the trial court's sentencing order referred to "insufficient mitigating circumstances as enumerated in Subsection (7) of said Section 921.141...." R.S. 13. This was almost identical to the sentencing order in *Hitchcock*. *See Hitchcock*, 481 U.S. at 398, 107 S.Ct. at 1824. The sentencing order does not mention nonstatutory mitigating circumstances. Furthermore there were no on-the-record statements by the trial judge indicating that he would consider nonstatutory circumstances. These factors support our conclusion that the trial judge did not consider nonstatutory mitigating circumstances, in violation of *Hitchcock*.

[4] Although we conclude that a *Hitchcock* violation occurred, that does not automatically require a reversal of Jackson's sentence. If the *Hitchcock* error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed. *See, e.g., Demps v. Dugger*, 874 F.2d 1385 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); *Clark v. Dugger*, 834 F.2d 1561 (11th Cir.1987), *cert. denied*, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). A *Hitchcock* violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory mitigating evidence regarding the defendant's character that was not considered by the jury would not have influenced the jury to recommend a life sentence. *See Demps v. Dugger*, 874 F.2d 1385, 1390 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Nonstatutory mitigating evidence not considered by the jury affects the jury's recommendation if it amounts to a significant mitigating circumstance. *See Delap v. Dugger*, 890 F.2d 285, 306 n. 23 (11th Cir.1989) ("The presence of substantial nonstatutory mitigating evidence in

8. In *Hitchcock*, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following...." The court then read the statutory mitigating factors set out in Fla.Stat. § 921.141(6). *See Hitchcock*, 481 U.S. at 398, 107 S.Ct. at 1824. The trial court at Jackson's sentencing hearing instructed the jury "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [Listing statutory mitigating factors]." Transcript of sentencing hearing at 795–96.

...a case ... is sufficient to render the *...itchcock* error not harmless beyond a rea...onable doubt"), *cert. denied*, — U.S. —, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); *Tafero v. Dugger*, 873 F.2d 249, 252 n. 4 (11th Cir.1989) (per curiam) (error harmless where "[t]he factors presented by Tafero contain little mitigating value."), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 962 (1990); *Jones v. Dugger*, 867 F.2d 1277, 1279 (11th Cir.1989) ("resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant....").

The State of Florida concedes that nonstatutory mitigating evidence was presented to the jury but maintains that this mitigating evidence was so insignificant that even if the jury could have considered it, they would not have been affected by it and the sentence recommendation would have been the same. Therefore, the State argues, the *Hitchcock* error was harmless beyond a reasonable doubt. This was the position taken by the Supreme Court of Florida when it reviewed Jackson's *Hitchcock* claim. *See Jackson v. Dugger*, 529 So.2d 1081, 1082 (Fla.1988). The court stated that "[v]iewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder." *Id.*

[5] The State of Florida argues that this court is bound by the supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir.1982), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). *See also Booker v. Dugger*, 922 F.2d 633, 636 n. 4 (11th Cir.1991).

[6] Jackson asserts that he produced significant evidence of nonstatutory mitigating circumstances. He points to evidence that he had served in the military for eight years; he served overseas, including three tours of combat duty in Vietnam; he was wounded in the chest while in Vietnam; he was a religious person; he had no history of prior violence; he had attempted to go to college; and he was amenable to incarceration.

After reviewing the transcript of the sentencing hearing, we conclude that Jackson's military service is a significant nonstatutory mitigating circumstance that the jury was not allowed to consider. A psychologist, who interviewed Jackson, testified that, "I believe he [Jackson] told me he was in the army for eight years.... He said that he was in Vietnam three times and on each of those occasions he was in a combat situation for [a] fairly lengthy period of time." Sentencing Transcript at 741–42.

We believe that Jackson's military service is in and of itself a significant mitigating circumstance. We therefore need not decide whether the other evidence presented by Jackson was significant. The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in *Demps v. Dugger*, 874 F.2d 1385 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In *Demps*, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this court stated "that the record reflects no evidence indicating any overseas combat experience." *Id.* at 1390. Thus, the *Demps* court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.

We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the *Hitchcock* violation. We do not hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance.

We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

ii. *Other Claims Relating to Sentence*

Jackson also appeals the denial of relief on six other claims that challenge his death sentence. Because we hold that he is entitled to a new sentencing hearing, we do not address these claims.

III. CONCLUSION

We AFFIRM the district court's order denying relief regarding Jackson's convictions. We conclude that Jackson's sentencing hearing violated *Hitchcock v. Dugger* and that the error was not harmless beyond a reasonable doubt. We therefore REVERSE the district court's order denying relief regarding Jackson's sentence and REMAND to the district court with instructions to enter an order granting the petition for a writ of habeas corpus unless the State of Florida, within a reasonable time, either: (a) affords Jackson a new sentencing hearing and resentences Jackson in a proceeding that is consistent with the requirements of *Hitchcock*; or (b) vacates the death sentence and imposes a lesser sentence consistent with law.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Michael SOFARELLI, Plaintiff–Appellant,

v.

PINELLAS COUNTY, Pinellas County Sheriff Dept., Norman Hibbing, Alfred Swetay, Jeffrey S. Harman, Edward D. Carlson, Jr., Marytherese Bancroft, Defendants–Appellees.

Norman HIBBING, Marytherese Bancroft, Edward D. Carlson, Jr., Jeffrey Harman, Alfred Swetay, Plaintiffs–Counter–Defendants, Appellees,

v.

Michael SOFARELLI, Defendant–Counter–Claimant, Appellant.

Nos. 90–3274, 90–3281.

United States Court of Appeals, Eleventh Circuit.

April 29, 1991.

Property owner brought state court action to enjoin house owner from moving house into neighborhood. Neighbors intervened in case. House owner filed counter-claims alleging violations of Fair Housing Act and § 1983 and removed case. House owner then brought action under § 1983 and Fair Housing Act against neighbors, county, and sheriff's department to enjoin interference with move. The United States District Court for the Middle District of Florida, No. 89–1311–CIV-T–17B, 733 F.Supp. 1470, Elizabeth A. Kovachevich, J., remanded removed case to state court and dismissed house owner's claims. House owner appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) house owner had claim against neighbors under Fair Housing Act; (2) sheriff complied with substantive due process; and (3) removal of case was proper.

Affirmed in part, vacated in part, and remanded.